SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 124.

LOUISE M. MATTESON AND CHARLES D. MATTESON,

Plaintiffs in Error.

vs.

WILLIAM H. DENT, as Receiver of the First National Bank of Decorah, Iowa,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

Sumner W. Matteson died intestate, July 22nd, 1895, having been from the 31st of October, 1864, to and including the date of his death, the owner of ten shares of the capital stock of the First National Bank of Decorah, Iowa. He was a resident of the State of Minnesota, and letters of administration on his estate were issued by the Probate Court of Ramsey County, Minnesota, August 5th, 1895. Thereafter, and on the third of September, 1895, the time to file claims was limited to six months from that date, which time having expired, on the 27th of April, 1896, the Probate Court made its final de-

cree, distributing all of his estate, including these ten shares of stock, to the widow and children of the intestate, an undivided one-third to the widow and an undivided one-ninth to each of the six children, the estate so distributed being of the value of not less than one hundred thousand dollars, and so all the estate of the intestate, real, personal and mixed, passed out of the hands of the administrator, leaving no funds in his hands with which to meet any contingent liabilities of the said estate, which might become fixed and certain thereafter.

Thereafter and on the tenth day of November, 1896, the said bank was insolvent and was closed by the Comptroller of the Currency. On November 24th, 1896, Wm. H. Dent, the defendant in error, was appointed receiver of the bank by the Comptroller, who thereafter and on the 11th day of January, 1897, made an assessment and requisition on each of the stockholders of the bank who was such November 10th 1896, to pay on or before the 11th day of February, 1897, the face value of his stock, and authorized and directed the receiver to collect and receive the amounts due on such assessment.

The face value of each share of stock is $100, and the ten shares of stock above referred to have always been registered on the books of the bank in the name of the intestate, and have never been transferred on the books to his heirs, nor has the administrator of his estate nor have his heirs, ever taken any steps to notify the bank of any transfer thereof or to have the same transferred on the books of the bank, that the interstate's estate might be relieved from liability thereon.

The receiver gave due notice of the said assessment to the admistrator of the said estate, to the widow, and to each of the heirs of the said intestate, and as the assessment was not paid, he finally brought suit against the widow and all the said heirs, who were the next of kin of the intestate, under Chapter 77 of the General Statutes of Minnesota, 1894, to recover from the said heirs on the distributive shares received from the said estate, so much thereof as was necessary to satisfy the said assessment, setting up the above facts in his complaint. (Record pp. 16-17-18-19-20-21-22-23.) Services of process was secured

upon Louise M. Matteson, the widow, and Charles D. Matteson, one of the heirs, who demurred to said complaint, and from an order overruling such demurrer (Record p. 15.), appealed to the Supreme Court of Minnesota, which sustained the said order (Record pp. 32-33-34-35-36 and 37). Said defendants then answered said complaint, denying any liability to pay said assessment, but did not deny any fact set up in said plaintiff's complaint (Record pp. 23 and 24), and on motion of plaintiff, judgment was duly entered against them and each of them, upon the pleadings, in the sum of $1091.32 on the 25th day of February, 1898. (Record pp. 25-26 and 27). From this judgment said defendants appealed to the Supreme Court of Minnesota (Record p. 28), which duly affirmed said judgment (Record pp. 29-30 and 31), and entered judgment for costs against said appellants. (Record pp. 38-39.)

This matter now comes before this court on a writ of error to the Supreme Court of Minnesota (Record pp. 3 and 4). The law of the case, save as to the questions of construction of the United States Revised Statutes, sections 5139, 5151 and 5152, are settled by the decision of the Supreme Court of Minnesota above referred to.

The judgment of the Supreme Court must be affirmed for each of the following reasons:

1. WHILE THE REAL OWNER OF SHARES MIGHT BE HELD LIABLE ON THE STATUTORY LIABILITY, THE APPARENT OWNER, MAY, IN EVERY CASE BE HELD, UNLESS HE HAS TAKEN EVERY STEP NECESSARY TO HAVE HIMSELF RELEASED.

2 The receiver of the bank need not look beyond the books of the bank in seeking against whom to recover this liability.

3. The liability sought to be enforced, was a contingent liability, which did not become fixed and certain and

capable of liquidation until after the entry of the decree of distribution of the estate.

(a.) It was a liability of the ancestor, assumed at the time he bought the stock, and so enforceable under the Minnesota Statutes.

(b.) It was a liability of the estate, passing immediately thereto on the death of the ancestor, and so enforceable under the Minnesota Statutes.

4. The estate of the intestate is still in being, can be pursued, and is the apparent or registered owner of the stock.

5. Section 5152 of the Revised Statutes does not confine this liability of an estate to such time only as it remains in the hands of the administrator.

6. STOCK IN NATIONAL BANKING ASSOCIATIONS IS TRANSFERABLE ONLY ON THE BOOKS OF THE BANK. FOR ALL PURPOSES OF ENFORCEMENT OF STOCKHOLDERS' LIABILITY.

(a) TRANSFER BY OPERATION OF LAW IS NO EXCEPTION TO THE RULE.

7. The real owner of stock, for all purposes of section 5151, is he whose name appears as such on the books of the bank, except:

(a) When transfer has been made on the books of the bank for the purpose of avoiding the liability, or

(b) When the transferor has taken every step in his power to release himself from the liability by taking the shares to the bank for entry of transfer on the books.

8. IT WAS THE DUTY OF THE PERSONAL REPRESENTATIVE OF THE INTESTATE TO SEE THAT THE PROPER TRANSFERS WERE MADE, AND THIS DUTY HAVING BEEN NEGLECTED, THE ESTATE IS NOT RELEASED FROM LIABILITY.

POINTS AND AUTHORITIES.

The appellants claim that "only those persons who were shareholders in the National Bank Association at the time it became insolvent are, under the statutes of the United States, liable to pay the assessment sought to be recovered in this action; which claim" they contend, "was overruled and denied by the decision and judgment made and rendered" as aforesaid.

This contention is based upon an erroneous interpretation of Section 5151 of the Revised Statutes of the United States.

"The shareholders of every National Banking Association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Plaintiffs in error contend that under this statute, those persons *only* who were shareholders at the time the bank became insolvent, are liable, and so, the entry of the final decree of the Probate Court of Minnesota having set over these shares of stock to the heirs of the intestate, before the appointment of a receiver of the bank, the heirs immediately became the owners of the stock and are liable as such, though they took no steps to show their acceptance of the stock or their assumption of the liability of ownership.

They having thus become *the owners* of the stock prior to the appointment of a receiver, they contend, the Supreme Court of Minnesota erred in allowing the receiver of the bank to enforce this liability against them *as heirs and next of kin*, by following the estate of the intestate into their hands, under the Minnesota statutes set up in their brief now before this court.

While the real owner of shares might be held liable on the statutory liability, the apparent owner, may, in every case he held, unless he has taken every step necessary to have himself released.

The contention of appellants is untenable. To quote from the decision of Wallace, Circuit Judge, in Bank vs. Harmon, 79 Federal Reports. 891, affirmed by this court in 172 U. S. Rep, 644:

"The adjudications of the supreme court are controlling authority for several propositions applicable to the case in hand, which are as follows: (1) The *real owner* of the shares of the capital stock of a National Banking Association *may* in every case be treated as a shareholder, within the meaning of section 5151. (2) Any person who holds himself out as the owner of the shares, by allowing himself to appear as the registered owner thereof upon the books of the Banking Association, *may likewise be treated as a shareholder*, within the meaning of that section."

The real owner *may* be held, but the apparent or registered owner may be held also. The receiver of a national banking association when directed by the Comptroller of the Currency to levy an assessment, is not held strictly to discover the real owner of each share of stock, before bringing suit to recover on this liability. He has before him the books of the bank to guide him in bringing suits, and may proceed against any one whose name stands on such books, or he may discover that certain stock stands in the name of a straw man, and he may *elect* to proceed against the real owner. Time and again men who have actually sold and assigned their stock years before the levy of an assessment, and who have lost all title and interest therein, have been held liable to such an assessment, merely because they have neglected to take the steps necessary to release themselves from such liability by having proper entries of transfer made by the bank.

Hawkins vs. Glenn, 131 U. S., 319, (p. 335.)

Horton vs. Mercer, 18 C. C. A., 18.

Thompson on Corporations, Sections 3193, 3283.

The receiver of a bank need not look beyond the books of the bank in seeking against whom to recover this liability.

Even if the heirs of Sumner W. Matteson had actually

accepted and assumed ownership of the stock in question, the estate, or the administrator, the personal representative of the estate, took no steps to relieve the estate from this liability. The heirs took no steps to release the estate, either as a whole or in the distributive shares in which it came into their hands. The receiver of the bank found the name of Sumner W. Matteson registered on the books of the bank, and as he was dead, proceeded to follow his estate into the hands of his heirs, under the Minnesota statute. Under the great weight of opinions of this and other Federal courts, the receiver of a national bank need not look beyond the books of his bank in seeking against whom to enforce this liability. It is not necessarily the real owner of the stock at the time the bank becomes insolvent, who alone is liable.

And were these heirs the real owners of the stock at the time the bank became insolvent? Had they taken any steps, so far as the receiver could learn, to show that they accepted the terms of the final decree? They did not notify the bank to make the transfer; neither did the administrator. Even if it had been possible for the receiver to bring suits against the distributees under the final decree directly as owners of the stock, in several jurisdictions, which we do not admit, might he not have been met in each case with the answer that the defendant had not accepted the stock nor become a stockholder in the bank?

How could the receiver or creditors of the bank know whether the heirs had accepted the stock and assumed its liabities or not?

The bank was situated in Iowa and a Probate Court of Minnesota entered a decree purporting to set this stock over to certain heirs. That was all. No notice was ever received by the bank or receiver, of such transfer. The receiver took the only possible action he could.

The liability sought to be enforced, was a contingent liability which did not become fixed and certain and capable of liquidation until after the entry of the decree of distribution of the estate.

(a) It was a liability of the ancestor, assumed at the time he bought the stock, and so enforceable under the Minnesota Statutes.

(b) It was a liability of the estate, passing immediately thereto on the death of the ancestor, and so enforceable under the Minnesota Statutes.

The action was begun by the receiver of the bank under sections 5918 to 5925 inclusive, of General Statutes of Minnesota, 1894, in Chapter 77. Section 5918 provides that:

"The next kin of a deceased person are liable to an action by a creditor of the *estate*, to recover the distributive shares received out of such estate, or so much thereof as may be necessary to satisfy his debt; the action may be against all the next of kin jointly, or against any one or more of them."

Section 5924. "Heirs and devisees are liable to an action by a creditor of *a deceased person* to recover the debt, to the extent of the value of any real property inherited by, or devised to them; if such action is against the heirs, all the heirs who are liable shall be made parties to the action."

Whether this liability was one of the intestate or of his estate, it could be pursued under the Minnesota statutes in the manner in which this action has been brought.

Sumner W. Matteson was, up to the time of his death, the owner and holder of ten shares of the capital stock of the national banking association, and as such he was individually responsible, equally and ratably with the other stckholders, for all the contracts, debts and engagements of said association, to the extent of the amount of his stock therein, at the par value thereof, in addition tc the amount invested in such shares.

Revised Statutes, U. S., Section 5151.

This Court, in *Richmond vs. Irons*, 121 U. S. 27 (pages 55 to 56), has thus construed this statute:

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of

stock Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect and be as binding in all respects, as any other contracts of the individual stockholder."

Flash vs. Conn, 109 U. S., 371 (p. 377).

Thompson on Corporations, Sections 3018, 3320 et. seq.

Davis vs. Weed, (U. S. Dist. Ct.), 44 Conn. 569 (p. 580).

Wyles vs. Suydam, 64 N. Y., 173 (p. 176).

Cochran vs. Weichers, 119 N. Y., 399 (p. 402).

Bailey vs. Hollister, 26 N. Y., 112, (p. 116).

Lowry us. Inman, 46 N. Y., 119, (p. 125).

Altman's Appeal, 98 Pa. St. 505, (p. 513).

Stockholder's liability attached to Sumner W. Matteson as early as October 31st, 1864, was an essential element of the contract by which he became a stockholder in the bank at that date and was voluntarily entered into by him.

On the death of a stockholder in a National Banking Association, this liability passes immediately to his estate, and would do so even were it not for section 5152 of the Revised Statutes. This is not by virtue of any new contract, as the liability rests on the stock and is part of the contingent liability of the estate.

Davis vs. Weed, (supra.)

Parker vs. Robinson, 71 Fed. Rep. 256.

It is a contingent liability,—one depending upon some future event which may or may not happen, and it is therefore wholly uncertain whether there will ever be a liability.

Davis vs. Weed (supra).

Tourtelot vs. Finke, 87 Fed. Rep. 840.

Hantzch vs. Massolt, 61 Minn. 361.

Lake Phalen Co. vs. Lindeke, 66 Minn. 209.

Dent vs. Matteson, 70 Minn. 519.

Under the statutes of the United States, a suit to enforce the stockholder's liability cannot be maintained until the banking association has become insolvent, a receiver has been appointed, and, under the decisions of the United States courts, the Comptroller of the Currency has determined that it is necessary to enforce the liability of stockholders and has levied an assessment.

Young vs. Wempe, 46 Fed. Rep. 354.

National Bank vs. Case, 99 U. S. 628, (p. 634).

In this case no receiver was appointed for the bank nor had the Comptroller of the Currency levied an assessment until long after the time for presenting claims against the intestate's estate had expired. (Record, pp. 17 and 20). Until after that time it was a matter of uncertainty whether there would ever be such a claim against his estate. All depended upon the contingency of the bank's becoming insolvent, of its inability to meet its liabilities, and of the levy of the assessment upon its stock.

The claim of the receiver of the bank depended upon a future uncertain event, for it might have happened that the bank would never become insolvent, or that even after a receiver had been appointed, enough could have been realized from the assets in the hands of the receiver to pay off in full all claims of the creditors of the bank. Clearly the claim of the defendant in error was a contingent claim, incapable of liquidation until it became absolute by the levy of the assessment upon the stock, and so he proceeded under the statutes of Minnesota cited above, to follow the distributitive shares of the intestate's estate into the hands of his heirs and next of kin, to collect this liability, which was voluntarily assumed by the intestate at the time he purchased the stock, and which on his decease passed immediately to his estate.

This contingent liability was a liability of the ancestor, assumed voluntarily at the time he took the stock and continuing to the date of his death. It was a liability of his estate, passing

to the estate on the death of the intestate. It was properly pursued by following the distributive shares of the estate into the hands of the heirs and next of kin. It was enough, that the intestate had been subject to this liability, to set the machinery of the Minnesota statute working. Enough that the estate had had the liability prior to the appointment of a receiver.

The estate of the intestate is still in being, can be pursued, and is the apparent or registered owner of the stock.

Plaintiffs in error contend that he only is liable who is the owner of the stock at the time the bank is declared insolvent. That the deceased was not a stockholder at that time, being dead; that the administrator was not a shareholder, it having been discharged. They contend, further, that the estate was not liable, the property having been distributed by the final decree, to which contention we take exception, as noted heretofore and hereafter. And that even if the transfer to the heirs should be held to be void, no transfer having been entered on the books of the bank, the estate was not and could not be the shareholder at the time the bank was declared insolvent, because there was no estate. In other words, the estate immediately ceased and determined upon the entry of the final decree, distributing the property of the estate. As if mere loss of one's property puts one out of being. As if a man must of necessity die because he becomes insolvent. *The estate still exists and*, so far as the receiver and creditors of the bank are concerned, *was the owner of the stock at the time the bank became insolvent.* The property of the estate passed into the hands of the heirs by entry of the final decree, to such extent as the heirs chose to accept it. The estate did not thereby cease and determine, but was and still remains a debtor on this liability. It was for the purpose of keeping the lien of just such a liability upon the property of an estate, and of enabling creditors to enforce this lien against this property, even after it had passed into the hands of the distributees, that the Minnesota statutes above cited were passed.

The Supreme Court of Minnesota must be held to be the court of last resort in questions involving the construction and meaning of the Minnesota statutes above referred to, and also as to whether the estate of a citizen survives after the entry of the final decree by the Probate Court of Minnesota. We would respectfully call the Court's attention to the cases of *Hantzch vs. Massolt 61, Minn. 36, and Lake Phalen Company vs. Lindeke, 66 Minn. 209.*

In each case the contingent liability sought to be enforced did not become fixed and certain until long after the entry of the final decree, distributing the estate of the deceased. The cases cited by plaintiffs in error to show that the estate passes out of existence on entry of the final decree, go only to show that upon and by reason of the entry of the final decree, the property of the estate passes out of the hands of the executor or administrator, who is, *ipso facto*, discharged. The decision from which this appeal is taken, effectually disposes of the point in question.

Section 5152 of the Revised Stautes does not confine this liability of an estate to such time only as it remains in the hands of the administrator.

Plaintiffs in error contend that the estate of a deceased stockholder in a national banking association can be liable only, (1) when the administrator or executor *holds* the stock and has estate or funds of the deceased in his possession or (2) when the deceased, at the time of his death, was indebted for the assessment. The last point we have already discussed. The deceased assumed the liability at the time he took the stock, and was from that time actually liable to the date of his decease, though the contingent liability did not become fixed and certain until after his death.

Richmond vs. Irons 121 U. S. 27.
Flash vs. Conn. 109 U. S. 371.
Davis vs. Weed, 44 Conn. 569.
Tourtelot vs. Finke, 87 Fed. Rep. 840.

The construction placed by plaintiffs in error on Section 5152 is clearly erroneous in view of the universal rulings of the Federal Courts.

"Persons holding stock as executors, administrators, guardians or trustees, shall not be *personally* subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name."

Plaintiffs in error endeavor to read into this statute, that the liability of an estate exists only as long as the estate remains in the hands of the executor or administrator. That as soon as the administrator puts out of his hands sufficient funds to meet such a liability, the liability of the estate ceases. That in fact there can be a shareholder's liability only during the life of the shareholder and during the time his administrator holds sufficient funds of his estate in his hands to meet such a liability. Under this construction an administrator would do well to close an estate as rapidly as possible if, among its funds, he found stock in a bank of uncertain standing.

Section 5152 was never intended to narrow and qualify the general rule of liability under section 5151. We quote from but two Federal decisions on this point, which are sufficient to show the universal ruling.

"The provisions of section 5152, relating to stock held by executors, administrators, guardians or trustees, are purely supplementary and are intended only to relieve the classes of persons named therein from execution against their individual assets, and they do not qualify the general rule of liability under section 5151."

Parker vs. Robinson, 71 Fed. Rep. 256.

"I do not think that section 5152 was intended to affect the liability for assessment of estates in process of settlement. The principal object of the section was to prevent a personal liabilty from running against executors, administrators, trustees or guardians, who had purchased as trustees, or to whom had

been transferred in their names, as trustees, national bank stocks for the benefit of the trust estates. Having by such purchase voluntarily entered into a *contingent* liability for assessments, it might be claimed that a judgment, *de bonis propriis*, could be rendered against them. The main object of the section was to prevent personal judgments being rendered against such persons in whom the stock stood on the books of the bank, as trustees."

Davis vs. Weed, (U. S. Dist. Ct.), 44 Conn., 569.

It cannot be denied that this liability is one that survives against the estate of the deceased.

Richmond vs. Irons, 121 U. S., 27, (p. 56).
Cook on Stock and Stockholders, Section 248.
Thompson on Corporations, Sections 3026 and 33 20 et seq.
Bailey vs. Hollister, 26 N. Y., 112 (p. 116).
Cochran vs. Weichers, 119 N. Y., 399 (402).
Wickham vs. Hull, 60 Fed. Rep, 326 (p. 329).

The plaintiffs in error lay great stress on certain dicta in the decision of *Witters vs. Sowles, 32 Fed. Rep. 130*, contending that this action will not lie under the United States statutes in that the complaint fails to allege that any debt or liability was incurred by the bank during the lifetime of the intestate, or, at least, before his estate was distributed.

That decision is not in point at all. The action was brought to follow into the hands of Margaret B. Sowles, the assets received by her as residuary legatee of the residuary legatee of Hiram Bellows, and to charge these and other assets of the estate, not yet distributed, with an assessment upon four hundred shares of the capital stock of a national banking association. These shares had been the property of Hiram Bellows, but had been transferred in the course of administration by the executors of his estate and of that of his residuary legatee, to the said Margaret B. Sowles, with her assent, *and the transfer had been regularly entered upon the books of the bank some three years before the bank became insolvent and the assess-*

ment was levied, and accordingly the court held that she should have been proceeded against directly as owner. The dicta referred to are not, strictly, a part of the decision, and are entirely aside from the matter in question. They are, too, directly in the face of the decision of this Court in Richmond vs. Irons, from which we have quoted quite fully *supra*. The liability is a contingent one without question, an essential element of the contract by which a stockholder becomes a member of the corporation, which becomes fixed and certain only when an assessment is levied by order of the Comptroller of the Currency.

The First National Bank of Decorah, Iowa, was insolvent on the 10th day of November, 1896 (Record p. 17), so much so that the Comptroller of Currency decided it necessary to levy an assessment of one hundred per cent upon the stock (Record pp. 17 and 18). For thirty years Sumner W. Matteson had held stock in the bank (Record p. 18), and it was declared insolvent but little over a year after his decease, barely six months after his estate had been distributed (Record pp. 19 and 20). Can appellants maintain that there were no debts, contracts or engagements entered into by the bank during the lifetime of Sumner W. Matteson, or before the distribution of his estate, whereby the liability of a shareholder attached? Carrying these dicta above referred to to their logical conclusion, where would the plaintiff in this case stand? It would be necessary for him to allege and prove the amount of the liabilities incurred by the bank prior to the death of the intestate, or prior to the distribution of his estate, and also the relative liability of intestate or of his estate. The assessment levied under the direction of the Comptroller of the Currency could not be final as deciding the liability of intestate's estate, though frequently so declared by the United States courts.

Young vs. Wempe, 46 Fed. Rep. 354.
National Bank vs. Case, 99 U. S. 628.

To quote from the decision of the Minnesota Supreme Court in the first appeal in this action: "So far as what is here said is inconsistent with certain dicta in Witters vs. Sowles, *supra*, we are not disposed to follow that case, and do not be-

lieve that the Federal court or courts of last resort will do so." (Record p. 36.)

II.

Plaintiffs in error claim that "the provisions of the United States statutes for transferring capital stock of national banking associations on the books of such associations do not have reference to, nor apply in cases where the title is transferred by operation of law in the course of administration proceedings upon the estate of a deceased shareholder; "that his death and the entry of a final decree distributing his estate and discharging his administrator, releases deceased and his estate, without the entry of such transfer on the books of the bank, provided the bank has not been declared insolvent prior to the entry of such decree; that at any rate his estate could not be assessed for debts incurred by the bank subsequent to the entry of such final decree, even though the stock still remained on the books of the bank in the name of the deceased and neither his heirs nor personal representatives took any steps to have such transfer noted.

Each of these contentions raises directly the question of the construction of section 5139 of the Revised Statutes of the United States, relating to national banking associations.

Stock in national banking associations is transferable only on the books of the bank for all purposes of enforcement of stockholders liability. (a) Transfer by operation of law is no exception to the rule.

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and *transferable on the books of the association* in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder *by such transfer* shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares."

This Court, in *Richmond vs. Irons, 121 U. S. 27 (p. 58)*, speaks thus in construing this section:

"By Section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the associations, *the stock being transferable only in that way.* No person becomes a shareholder, subject to such liabilities and succeeding to such rights *except by such transfer*; until such transfer the prior holder is the stockholder for all the purposes of the law."

The certificate of stock issued to Sumner W. Matteson and representing such shares, states on its face that *the stock is transferable only upon the books of the said bank.* (Record p. 23). No such transfer of the stock of Sumner W. Matteson appears on the books of the First National Bank of Decorah, nor is there any endorsement of such transfer upon the said certificate of stock. (Record p. 21). It is a well settled doctrine of law that until a transfer of stock is duly recorded in the transfer books of the corporation, the transferor is not released from liability, but is still held liable to the creditors of the corporation.

Cook, Stock, Stockholders, etc., Sections 258 and 262.

Thompson on Corporations, Sections 3193 and 3283, et seq.

This rule is more strictly enforced in reference to transfers of stock in a national banking association, owing to the wording of the statute above quoted.

Richmond vs. Irons, supra.
Hawkins vs. Glenn, 131 U. S., 319 (p. 335).
Bowdell vs. Bank, 2 N. B. C., 146.
Johnston vs. Laflin, 103 U. S., 800 (p. 804).
Irons vs. Bank, 27 Fed. Rep. 591 (p. 595).
Borland vs. Haven, 37 Fed. Rep. 394 (p. 407).
Price vs. Whitney, 28 Fed. Rep. 297.
Whitney vs Butler, 118 U. S. 655.
Robinson vs. Bank, 94 Fed. Rep. 964.
Davis vs. Weed, 44 Conn. 569 (p. 580).

As to the heirs of Sumner W. Matteson and all persons directly interested in his estate, the decree entered by the

Probate Court, distributing his estate, is final. As to the creditors of the First National Bank of Decorah, Iowa, in which Matteson owned stock, and as to the receiver, the defendant in error, representing these creditors, this decree was of no effect. They had no notice of change in title to the stock. At the date of the insolvency of the bank, the appointment of the receiver and the levy of the assessment, these ten shares of stock stood in the name of Sumner W. Matteson on the books of the bank. Beyond this the receiver need not look to discover who are the owners of the stock. The doctrine is too well settled to need citation of authorities, that he whose name appears on the books of the corporation as a shareholder is the shareholder, both as to the corporation and as to the public.

"Every person whose name by his authority has been *placed on the books* of a corporation, is such, both as to the corporation and to its creditors, so long as his name remains there." "So, although he may have sold his shares to another, and received pay for them, and delivered to the purchaser his certificate,—yet until the transfer has been perfected by requesting the transfer on the corporate books, as required by the charter, statute, articles of association, or deed of settlement governing the company, the transfer though valid as between him and the transferee, does not divest his liability as a shareholder, to the company or to its creditors." "The registration being intended in part for the protection of the public, one who has parted with his shares, and yet suffers his name to remain on the register, remains a stockholder by *conduct* or *estoppel*."

Thompson on Corporations, Sections 3283 and 3284.

The certificate of stock duly issued to Sumner W. Matteson, declares on its face that it is transferable only on the books of the bank. The United States statute demands the same formalities. The United States courts declare in terms, that one who disposes of his stock and neglects to take proper steps to have it transferred on the books of the bank, remains liable thereon. On the tenth day of November, 1896, Sumner W. Matteson stood on the books of the bank, the owner of ten shares of the capital stock, and on that day the bank was insolvent.

The were the *"ownership of the stock and creation of a liability by the bank together."* And yet plaintiffs in error claim that the ownership of the stock did not exist in the estate of Sumner W. Matteson on that day. So far as the receiver and creditors of the bank were concerned, it most assuredly did.

This court has invariably ruled that every person whose name is allowed to remain upon the books of the bank, is liable as a shareholders, save in one or two cases in which the transferor of the stock had taken every step in his power to have the transfer properly noted on the books of the bank.

Whitney vs. Butler, 118 U. S. 655.

See also all cases last cited.

Plaintiffs in error, while admitting the general rule to be as we have stated it, endeavor to make a distinction in favor of one small class of cases,— those in which "the title is transferred by operation of law in the course of administration proceedings upon the estate of a deceased shareholder." Just why this one exception should be made, they do not state, except to say that the statute was never intended to apply to such a case, nor do they cite a single opinion in support of their contention.

The statute was intended primarily for the protection of the creditors of the bank, that they,—or their representative, should a receiver be appointed,—may know to whom to look when giving credit to the bank or seeking to recover for advances. If this one exception to the law is made in favor of the transferees by operation of law, it is as great a hardship to the creditors and to the receiver as if an exception were made in favor of any other class of persons.

Why should this exception be made? In *Robinson vs. Bank, 94 Federal Reports. 964,* the pledgee of shares of national bank stock had the stock sold in accordance with the terms of the pledge, notifying the pledgor of the sale, and became the purchaser, as between himself and the pledgor the actual owner of the stock, but failed to have the transfer entered on the books of the bank. He was held not to be liable to

an assessment made on the bank's insolvency, his name not being on the books of the bank. The court holds that no man can be held to the liability under section 5151, save he whose name appears on the books of the bank, or he who transfers his stock on the books of the bank to escape the liability.

The Court says: "The facts certainly would have justified a finding by the jury that the relation of pledgor and pledgee had been terminated by the defendant, and the defendant had become the purchaser of the stock with the intention of becoming the exclusive owner, and was in this sense its owner when the bank failed. The only ground upon which it could be ruled that the plaintiff was not entitled to recover was that, as *the stock had never been transferred to the defendant upon the books* of the bank, and remained in the name of the original owner, the defendant was not a shareholder within the meaning of section 5151." * * * * "An examination of the cases cited by the supreme court fails to disclose one in which the owner of the shares has been held liable, under the section, who has never been the owner upon the books of the bank; and the cases in which the real owner has been held liable are those in which, being the registered owner, he had transferred his shares to another for the purpose of escaping the liability of a stockholder. or caused them to be registered in the name of an irresponsible transferee." * * * "Our conclusion is that the defendant, never having been a registered shareholder of the bank, is not liable to the assessment."

The real owner of stock, for all purposes of section 5151, is he whose name appears as such on the books of the bank, except:

(a) When a transfer has been made on the books of the bank for the purpose of avoiding the liability, or

(b) When the transferor has taken every step in his power to release himself from the liability by taking the shares to the bank for entry of transfer on the books.

The general rule is that a transfer of stock can be made only upon the books of the bank. He who is not so registered is not a stockholder, in the sense of section 5151, except in cases where he has transferred his stock to escape liability. In

face of this the plaintiffs in error claim that we should have sued the distributees under the final decree of the Probate Court, as *shareholders*. Under the invariable ruling of the United States courts, *they never became shareholders*, the stock never having been transferred on the books of the bank, so that the receiver could have sued them as such.

Robinson vs. Bank, (*supra*).

Richmond vs. Irons, (*supra*).

An examination of the cases decided by this court shows that in every case in which the "real owner" of stock was held for this liability, though the stock stood in the name of another upon the books of the bank, the stock had been transferred to the registered owner for the purpose of saving the real owner from this liability.

Bank vs. Case, 99 U. S. 628.

Bowdin vs. Johnson, 107 U. S 251.

Davis vs. Stevens, 17 Blatch 259.

There is not one single case decided by this Court in which a man has been held liable under section 5151, unless his name stood on the books of the bank as the actual owner of the shares, or unless he had trasferred them from his own name to that of another on the books for the purpose of escaping this liability. There is but one case decided by any Federal Court in which this liability has been enforced against a man whose name never appeared on the books of the bank as a shareholder, and in that case the actual purchaser, to avoid this liability, had the stock taken in the name of his agent, an irresponsible person. In that case the court held the actual purchaser liable on the ground that "the debt of the agent is the debt of the principal and always recoverable from the principal."

Davis vs. Stevens, (*supra.*)

In every case in which the registered owner has been relieved from this liability, it has been done only because he has taken every step necessary to see that the proper entry of transfer to his transferee was made on the books of the bank.

Whitney vs. Butler, 118 U. S. 655.
Earle vs. Coyle, 95 Fed. Rep. 99.

It was the duty of the personal representative of the intestate to see that the proper transfers were made, and this duty having been neglected, the estate is not released from liability.

The doctrine of estoppel has much to do with holding a man to this liability if he fails and neglects to see that the transfer is properly entered on the books of the bank. But plaintiffs in error object that "a dead man cannot cause his stock to be transferred and the law does not require an impossible thing," that the deceased "is not in any way to blame for such failure to transfer. It was not the duty of the distributees to cause the transfer to be made." And for what purpose is a personal representative of a deceased person appointed by the Probate Court? Is it not the duty of an administrator to see that the estate of his intestate is relieved of such liability when he transfers the stock? If the heirs did not desire to have the distributive shares of the estate followed into their hands, they should have seen that the transfer was properly made. Neither the administrator nor the heirs took a step to relieve the estate of this liability. (Record p. 21). They had but to present the certificate of stock to the bank with a copy of the final decree, and have new certificates issued, and the name of Sumner W. Matteson would no longer have stood on the books of the bank, his estate would have been relieved of this liability, and the receiver *could* have proceeded against the heirs as shareholders of the bank. As it is, the receiver had no choice but to levy the assessment against the estate of Sumner W. Matteson, being guided by the books of the bank, and all owing to the negligence of the heirs and administrator. This was no mere mistake of judgment on their part either, but an utter disregard of their legal duty to have such transfer made.

Price vs. Whitney, 28 Fed. Rep. 297.
Whitney vs. Butler, 118 U. S. 655.

We wish to call special attention to the two cases last cited—which bear directly on the case at bar. In *Price vs. Whitney*, the receiver of a national banking association brought suit to collect an assessment levied on stock standing in the name of the defendants' testator at the time the bank became insolvent. Some time prior to the bank's insolvency, the defendants had sold the said stock through a broker, at public auction, to one George R. Eager, and received payment for the same. The court held the defendants liable, as executors, saying:

"It was the *duty* of the defendants to have seen that the stock was transferred on the books of the bank. The by-laws provide that the stock shall be assignable only on the books of the bank, and that the certificate of stock shall state upon the face thereof that the stock is transferable only upon the books of the bank and when transferred the certificates shall be returned and canceled."

On appeal to this Court *Whitney vs. Butler, 118 U. S. 655*, that decision was reversed, on the ground that Eager was employed by the president of the bank to purchase the stock for a customer of the bank, and that he delivered to the president the certificate of stock, with duly executed power of attorney to make the transfer. The Court held that the executors had fulfilled their duty when the stock was delivered to the bank with knowledge of the bank that the sale had been consumated, and power and authority given the bank to make the necessary transfer on its books. The holding of the lower court that it was the duty of the executors to see that the stock was transferred on the books of the bank was sustained. As this decision bears clearly on many points in the case at issue, we quote fully from it:

"We do not think that the question arising upon these facts is concluded by any of the cases cited in the opinion of the circuit judge, or in those cited in the brief for the receiver. In nearly all of them, where the issue was between the receiver, representing the creditors, and the person standing on the register of the bank as a shareholder, it is said, generally, that *the creditors of a national bank are entitled to know who, as shareholders, have pledged their individual liability as security*

for its debts, engagements, and contracts; that if a person permits his name to appear and remain in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made. Some of the cases hold that the seller is liable as a shareholder even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. But it will be found, upon careful examination, that in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. *The position of the seller, in such case, is analagous to that of a grantor of a deed deposited in the proper office to be recorded.* The general rule is, that the deed is considered as recorded from the time of such deposit. 2 Washburn on Real Property, B 3, ch. 4, par. 52. Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, *the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register.*

"In the case before us the personal presence of the defendants at the bank was not required in order to secure their release from liability as shareholders. Besides, the certificates of stock authorized them to act by attorney. Through their agents, the brokers, who sold the stock, and through whom they received the money paid for it, they surrendered the certificates and power of attorney to the president of the bank, he receiving them, with knowledge not only that defendants had parted with all title to the stock and had been paid for it, but, also, that it had been purchased at public auction by Eager. He knew equally well that *the surrender of the certificates and the delivery of the power of attorney and the certificate from the*

Probate Court could only have been for the purpose of having it appear, by means of a transfer on the books of the bank, that Whitney's executors were no longer shareholders. The right to have the transfer made, and thereby secure exemption from further responsibility, was secured to the defendants both by the statute and by the by-laws of the bank. *They did all that was required by either as preliminary to such transfer.* Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books. If, when the agents of defendants delivered the certificates and power of attorney to the president of the bank, the latter had given any intimation of a purpose not to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn's order, it may be that the failure of the defendants to take legal steps to compel a transfer would, in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such avowal was made. No objection was made to the power of attorney, or to the discharge of the defendants from liability. So far as the record shows, nothing was said or done by the bank's officers to raise a doubt in the minds of the defendant's agents that the transfer would be made at once.

"It was suggested in argument that the defendants should have seen that the transfer was made, but we were not told precisely what ought to have been done to this end that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was under all the circumstances, that of careful, prudent, business men, and it would be a harsh interpretation of their acts to hold (in the language of some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock register as a shareholder. We are of opinion that, within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased

upon the surrender of the certificates to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock, on the books of the association, to the purchaser."

The judgment of the Supreme Court of Minnesota should be affirmed, if for no other reason, because the personal representatives of Sumner W. Matteson failed and neglected to take the proper steps to release his estate from this liability.

III.

The third assignment of error, that "under the provisions of the United States statute no such liability exists as is sought to be enforced in said action, or as is adjudged in and by said judgment," is so clearly connected and inter-dependent with the other assignments of error, that all questions arising thereupon have been duly discussed heretofore in this brief.

Before closing, we wish respectfully to call the Court's attention to the case of *Davis vs. Weed*, decided by the United States District Court for the district of Connecticut and reported in *44 Conn. 569*, which is very nearly on all fours with the case at issue. The action was one at law, brought by the receiver of the Ocean National Bank of the City of New York, to recover an assessment which was claimed to be due from the defendant as administrator *de bonis non* of the estate of Nathaniel Weed who died intestate, possessed of five hundred and fourteen shares of the capital stock of the bank. In that case, as in this, the intestate, a shareholder on the books of the bank, died, the time within which to file claims against the estate had expired, the estate was duly administered, and all the property of the estate had passed out of the hands of the administrator, long prior to the levy of the assessment. The State of Connecticut did not provide by statute for a method of following the estate into the hands of the heirs and next of kin by bringing suit against them directly, as Minnesota does, but provided a method of bringing suit against the administrator to determine the validity of a claim against the estate which had accrued subsequent to the distribution thereof. This variance is,

however, immaterial. We quote the second part of this decision, calling the attention of the court to the similarity existing in the defensive tactics employed in that case and in the one at issue.

"II. The defendant next insists that, inasmuch as the intestate died previous to the insolvency of the bank, there was, at the time of his death, no claim, contingent or otherwise; against his estate; that the title of the stock vested by operation of law in the administrator upon his appointment; that the assessment is against stockholders, and that therefore the liability has accrued against the administrator who hold the stock as trustee; that by section 5152 of the Revised Statutes, he is freed from personal liability, and that the estate and funds only which are in his hands are liable for payment, and that it is admitted by the pleadings that the defendant has no estate or funds in his hands.

"The action is based upon the theory that the claim is against the estate of the intestate as an estate in process of settlement, and under the facts in the case the question arises whether a receiver of a insolvent national banking association has a valid claim for an assessment against the estate generally of a deceased stockholder, who died prior to the insolvency of the bank, but whose stock has not been transferred at the date of the comptroller's order. The defendant contends that the receiver never had a claim against the estate of Nathaniel Weed, but that his claim is against existing stockholders, and that the title to the stock vested in the administrator September 9th, 1872, and related back to the date of intestate's death.

"It is true that the title to personal property of an intestate vests in Connecticut in his administrator by force of local law and the grant of administration, but I think that the claim of the defendant, although ingenious, is not tenable, for the following reasons:

"1. 'An executor or administrator has his estate as such in *autre droit* merely, viz.: as the minister or dispenser of the goods of the dead.' Williams on Executors, 562.

"2. The original liability of the intestate to pay the assessments which may be ordered by the comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered

into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the liability has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any contract, for the admistrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud. *Corning v. McCullough, 1 Comst., 47; Bailey v. Hollister, 26 N. York, 112; Loury v. Inman, 46 N. York, 119; Hawthorne v. Calef, 2 Wall., 22; Gray v. Coffin, 9 Cush, 192.*

"3. When an obligation devolves upon an executor solely by virtue of his successorship to the estate, and not by express contract or agreement of his own, the estate is liable. If an executor is liable to pay an obligation resting upon personal property which came to him from the testator, and of which the executor is the owner only as a representative of the estate, and which obligation is due from him solely because he represents the estate, he is liable as executor, even if suit might have also been brought against him personally. *East Hartford vs. Pitkin, 8 Conn., 404, per Williams, J.*

"4. I do not think that section 5152 was intended to affect the liability for assessments of estates in process of settlement. The principal object of the section was to prevent a personal liability from running against executors, administrators, trustees or guardians, who had purchased as trustees, or to whom had been transferred in their names, as trustees national bank stock for the benefit of the trust estates. Having by such purchase voluntary entered into a contingent liability for assessments, it might be claimed that a judgment *de bonis propriis* could be rendered against them. The main object of the section was to prevent personal judgments being rendered against such persons in whom the stock stood on the books of the bank as trustees.

"I am therefore of opinion that the facts alleged in the plea are not a valid defense to prevent a judgment against the defendant from the estate of the intestate."

For the above reasons it is respectfully submitted, that the judgment appealed from should be affirmed.

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